Nos. 2209, 2210, and 2211.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2209.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

WILLIAM F. KETTENBACH, GEORGE H. KESTER, CLARENCE W. ROBNETT, WILLIAM DWYER, AND FRANK W. KETTENBACH, APPELLEES.

No. 2210.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

WILLIAM F. KETTENBACH, GEORGE H. KESTER, CLARENCE W. ROBNETT, WILLIAM DWYER, THE IDAHO TRUST COMPANY, A CORPORATION; THE LEWISTON NATIONAL BANK, A CORPORATION; THE CLEARWATER TIMBER COMPANY, A CORPORATION; ELIZABETH W. THATCHER, CURTIS THATCHER, ELIZABETH WHITE, EDNA P. KESTER, ELIZABETH KETTENBACH, MARTHA E. HALLETT, AND KITTY E. DWYER, APPELLEES.

No. 2211.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

WILLIAM F. KETTENBACH, GEORGE H. KESTER, AND WILLIAM DWYER, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

REPLY BRIEF ON BEHALF OF APPELLANT.

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REPLY BRIEF ON BEHALF OF APPELLANT.

Three briefs on behalf of the appellees have been filed in these cases. Mr. Tannahill filed an original

brief and also a supplemental brief on behalf of appellees William F. Kettenbach, George H. Kester, William Dwyer, Elizabeth White, Edna P. Kester, Martha E. Hallett, and Kittie E. Dwyer. Mr. Babb filed a brief on behalf of appellees Frank W. Kettenbach, Clearwater Timber Company, Idaho Trust Company, Lewiston National Bank, and Potlach Lumber Company.

For the convenience of the court and in order to avoid confusion, these briefs will be referred to herein as Tannahill's original brief; Tannahill's supplemental brief; and Babb's brief.

The briefs of appellees present to the court the facts in a form to magnify isolated, minor and immaterial circumstances, to distort the evidence, and to virtually conceal the essential form and substance of the evidence as it was presented before the special examiner. As a result the court gets therefrom only a confused and fragmentary picture without the perspective which is apparent when the entire evidence is viewed. Furthermore, in them the good faith of counsel and other representatives of the Government is assailed both in the conduct of the cases in the lower court, and also in the presentation of them to this court.

It will be noted that the principal appellees in these cases have been before this court on two other occasions (in the Lewiston National Bank cases, and the Land Fraud cases) in the past few years, and that each time they were represented by counsel, one of whom appears for them in the present cases; that

though the counsel, special agents, and many of the witnesses for the Government in said cases were not the same, the records show that affidavits were filed on behalf of appellees in both of them in an effort to show that the representatives of the Government had endeavored improperly to influence both juries; that in both of said cases said appellees were able to secure witnesses who testified that certain of the Government's witnesses had made statements in their hearing contrary to what they testified at said trials, and produce affidavits they had obtained from the Government witnesses containing statements at variance with their sworn testimony; and an attempt was made to show that the counsel and other representatives of the Government threatened or intimidated or otherwise improperly influenced the witnesses who testified in its behalf, all of which, however, met with small success. Notwithstanding the futility of such practice a similar system has been engaged in on behalf of the appellees mentioned in the present cases. Whether counsel think this proper forensic tactic or the ethics of legal practice we feel confident that in this court the course thus pursued will defeat its own purpose and by reason of the character of the proof offered to that end it will fall of its own weight.

The Government's original brief gives a statement of the facts relative to each entry and the pages of the record upon which the evidence in support thereof appears are cited. It is not pretended that everything that every witness said in connection

with the entries is mentioned, but a fair statement of the evidence affecting each entry is made and the true facts are frankly met and discussed.

APPELLANT SHIFTS POSITION.

It is contended by appellees that the Government has abandoned the contention urged upon the lower court that the timber and stone act is violated if one person acquires more than 160 acres of timber land, and that the Government has shifted from the position taken in the trial court that the proof showed that the entries were made pursuant to antecedent agreements, to the claim that they were made upon speculation and that that view of the cases was not presented at the trial, but for the first time in this court.

(*a*) We insisted in the lower court that the evidence was sufficient to show that the appellees conspired to acquire through the timber and stone act an area of land greatly in excess of the amount and area which they could lawfully acquire either individually or collectively as charged in the bills of complaint, and that they procured the entrymen to make entries in pursuance of the conspiracy, the purpose being to defeat the letter as well as the spirit of said act by using the agencies of the second section of said act to defeat the prohibitions of the first section thereof, and that appellant was entitled to the relief sought even though the entrymen did not swear falsely in making their initial application.

United States v. *Trinidad Coal Co.* 137 U. S., 160.

United States v. *Keitel,* 211 U. S., 370.

In the Barber Lumber Company case (172 Fed., 948), Judge Bean said:

> That it is a fraud upon the Government for an individual or an association of individuals to undertake to acquire a larger area of public land under the act referred to than such a party or association are entitled to in their own right, may be conceded.

As this court in deciding the same case on appeal (194 Fed., 31) did not consider the contention sound it was not urged upon the court again in the present cases.

(*b*) Appellant maintains that the evidence in the present cases shows that some of the entries were made pursuant to antecedent agreements, that others were made upon speculation and that still others were made both upon an understanding and agreement and also upon speculation.

(*c*) Counsel are in error in stating that the relief sought because of the speculative feature of the entries was urged for the first time in this court. In the lower court we contended that even though the evidence should not warrant the conclusion that a conspiracy between the appellees and others had been entered into, if it showed that the entrymen applied to purchase the tract by him or her sought to be entered, on speculation, and not in good faith to appropriate the same to his or her own exclusive use and benefit, and that the appellees or their agents knew of that fact, as to such entries the Government was entitled to the relief prayed.

SPECULATION.

We have discussed this feature of the cases in our original brief (pp. 278–290) and urged that the Supreme Court in deciding the Budd and other cases arising under the timber and stone act had not considered the speculative feature of the entries denounced by the act, and that the expressions in said cases that seem to dispose of that question are *obiter dicta* as that particular phase of the statute was not before the court nor necessary of comment in deciding the cases.

It has been held that—

> The opinion of a court can not be relied upon as a binding authority, unless the case called for its expression.

Re City Bank of New Orleans, 3 How., 292; that—

> Where a point has not been contested in a former decision the court is not bound by views expressed therein.

Cross v. *Burke*, 146 U. S., 82; that—

> An expression of opinion upon a point not decided by the court is a mere dictum, lacking the force of a judicial determination.

McCormick Harvesting Machine Co. v. *C. Aultman Co.*, 169 U. S., 606; that—

> The doctrine of *stare decisis* is a salutory one, but it only arises in respect of decisions directly upon the point in issue.

Pollock v. *Farmer's Loan & Trust Co.* (Income Tax case), 157 U. S., 429—

See also *Bardes* v. *First Nat. Bank,* 178 U. S., 524.

Harriman v. *Northern Securities Co.,* 197 U. S., 244;

Cohen v. *Virginia,* 6 Wheat., 264;

Plumley v. *Mass.,* 155 U. S., 461;

Northern Nat. Bank v. *Porter Twp.,* 110 U. S., 608.

Counsel for appellees contend that the discussion in Congress relative to the speculative feature of entries to be made under the timber and stone act "were prior to the amendment of the bill striking out the provisions that the applicant should swear that he was not seeking the land for the purpose of selling it." (Tannahill's Sup. B., 45.) The present bill as it passed both Houses of Congress was not an amendment of any other bill, but was in the same language as the bill that had passed the Senate at the preceding Congress except the words "and not for sale" were not contained in the bill. Thus the applicant had to swear, among other things, "that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit (and not for sale)," the other requirements of the applicant being the same in both bills. It seems clear that the purpose of the act was to allow persons who had need for timber lands in connection with their farms, mines, or other industries to acquire the same, but the entries were not to be made for the purpose of speculation or for the use and

benefit of any person but themselves, without any restriction upon them, however, as to the disposition of the land after they had acquired the title thereto. If at the time a person made application to enter a timber claim he had no agreement that the title he should acquire should inure to the benefit of another, or that he had not determined to enter the claim merely on speculation, the statute has not been violated. Had the words "and not for sale" been incorporated into the present act they might have restricted the sale of the claim under any circumstances at any time. These words, however, were omitted from the present act, but the word "speculation" is incorporated therein as it was in all the other proposed statutes on the subject, and it must be concluded that Congress meant that the word should have some significance, and it is even more apparent that it did so intend by reason of its omission of the words "and not for sale" which appear in the second succeeding line after the word "speculation" in the proposed act that failed of passage.

In further support of the contention that the word "speculation" has a significant bearing upon the statute and of the intention of Congress in not eliminating it from the bill we cite the case of *Williamson* v. *United States*, 207 U. S., 425, 459.

The court after stating that one of the requirements of section 2 of the timber and stone act is that the applicant shall declare that he makes the application not for the purpose of *speculation* but in good faith, * * * said:

"Examining the items (of the third section) which the statute requires the applicant to make proof of, after showing publication, it is apparent that while some of the things referred to in the prior section, and which are required to be stated in the preliminary proof are reiterated, all requirement is omitted of any statement regarding a *speculative purpose* on the part of the applicant, his *bona fides*, and his intention to acquire for himself alone. When the context of the statute is thus brought into view we are of the opinion that it can not possibly be held without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing, of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom. We say this, because as the third section reexacts in the final application a reiteration of some of the requirements concerning the character of the land made necessary in the first application and omits the requirement as to the bona fides, etc., of the applicant, it follows under the elementary rule that the inclusion of one is the exclusion of the other, that the reexacting of a portion only of the requirements was equivalent to an express declaration by Congress that the remaining requirements should not be exacted at the final proof. And *this becomes particularly cogent when the briefness of the act is considered, when the propinquity of the two provisions is borne in mind,* a propinquity which excludes the con-

ception that the legislative mind could possibly have overlooked in one section the provisions of a section immediately preceding, especially when in the last section some of the requirements of the prior section are reexpressed and made applicable to the final statement. * * * These conclusions are directly sustained by a recent ruling in *Adams* v. *Church*, 193 U. S., 510, construing the timber culture act. Under that law an applicant for entry was obliged, among other things, in making his application to swear to his *good faith* and its *absence of speculative* purpose, in the exact words of the statute now under consideration."

ANTECEDENT AGREEMENTS.

We have discussed a number of the cases arising out of entries made under the timber and stone act pursuant to a prior agreement (Gov. brief, 252–278), but in addition to those, is the case of *United States* v. *Belts*, 192 Fed., 708, 711, in which Judge Wolverton said:

> The defendant denies that there was any previous agreement or understanding with any of these parties to purchase their land when title was acquired by them. If it be that there were no such express agreements, there must have heen a tacit agreement in each case. Defendant was the only person vitally interested in procuring the titles, and he was paying all the expenses, even to the extent of the purchase price of the land from the Government; and was it not expected, and even understood, that he was finally to acquire the title by purchase from

> the entrymen, and this on an understanding reached at or before the time the entries were made? *It seems not within the bounds of reason that it could be otherwise;*

and also *United States* v. *Smith,* 181 Fed., 545, 549, in which Judge Bean said:

> It is true that there was no express agreement with the several applicants in either case that the entries should be made for the use and benefit of another, but it is *the effect of the entire testimony.* As Puter states in his testimony the conspirators studiously avoided entering into such an express contract or agreement, for they knew that it would be such an evidence of fraud as would invalidate the entry, but caused it to be reported, and the applicants to be advised by other parties, that if they would make the applications they would receive upon making final proof the stipulated sum, and they acted on such understanding in making the application and subsequently conveying the property as directed by Puter and McKinley and Mealey.

The entrymen in this case also gave mortgages to secure the money advanced. The latter case was affirmed and the finding of facts therein approved by this court in *United States* v. *Smith et al.,* 196 Fed., 593, 595.

SPECULATION AND ANTECEDENT AGREEMENTS.

In addition to what is shown throughout our original brief in regard to the appellees' purpose and

intention of acquiring timber lands, the trial court in referring to the matter, said:

> Upon the one hand, it is undoubtedly true that the defendants were acquiring timber lands, and w re lending encouragement and assistance to qualified entrymen, with the hope at least that they would be able to purchase the title after it passed from the Government into private ownership. At least in some quarters of the community the belief prevailed that so long as there was no contract in writing, a verbal agreement or a tacitunder standing was not in violation of the law; and we are not without evidence of the fact that the idea was more or less generally entertained that so long as the entryman was qualified and the Government was being paid the price which it asked for the land no wrong would be done by an evasion of the technical requirements of the law. (R., 363.)

Again the court said:

> That O'Keefe was actuated both by a feeling of friendliness to the entryman and by the hope, if not the expectation, that sooner or later Kester and Kettenbach would be able to acquire title to the claim and that he would receive a commission or compensation in some other form, and that Kester by reason of his business relations with O'Keefe and *his hope of securing title to the claims sooner or later,* permitted O'Keefe to draw from the funds of the bank in excess of the credit which would ordinarily be extended, * * *. (R., 331.)

The court also said:

> Unquestionably, O'Keefe got the money at the Lewiston National Bank for the entrymen, and it is wholly probable that the defendants Kettenbach, Kester, and Dwyer knew that it was being furnished for the purpose of paying the expenses of and making final proof upon the entry. (R., 329.)

And, further, in commenting upon the Robnett group, the court said:

> The understanding, as I gather it from all the evidence and the circumstances disclosed by the record, including the statements of the several parties, is that Robnett, in encourgaing these men to make entries led them to believe that he would be able to negotiate a sale of the lands after title was secured, so that they would realize a substantial profit, and in that belief they entered the lands and assumed the mortgage obligations referred to. (R., 323.)

Apart from the evidence set out in our original brief in connection with each entry showing that they were made pursuant to prior agreements and on speculation, the evidence quoted in the brief of the appellees (Tannahill's orig. B., pp. 6 to 141) shows that the claims in connection with which the quotations are made were entered in such instances pursuant to prior agreements, others upon speculation, and others pursuant to prior agreement and also on speculation. It must be borne in mind that many, if not almost all, of the entrymen forming the Robnett group, the O'Keefe group,

the Steffey group, and others, testified to the effect that they entered the claims for the purpose of selling them to make a profit. As to a number of them, the approximate date of the sale and the amount of profit was mentioned, and in some the sale was guaranteed, and the money to initiate and perfect the entries was furnished as heretofore shown. If it could be held that in such circumstances such entries were not made upon speculation in violation of the statute, and that the other evidence relative to the entries was not sufficient to justify the finding that they were made pursuant to prior agreements, what would prevent an agent of a timber company, his principal not being disclosed, in inducing any number of persons to enter timber claims, and to say to them that they will be able to sell them within a stated period; and furnish them a part or all of the money to purchase the land and then have his principal negotiate for the purchase of the lands or negotiate the sale of them himself to his principal? Surely claims entered under such conditions would be in fraud of the statute.

WITNESSES HOSTILE, RELUCTANT AND INTERESTS ADVERSE.

Appellees contend that the only hostility evinced by the witnesses on behalf of the Government was that they failed to testify in support of the charges made in the bills; that the Government is unqualifiedly bound by all the testimony of its witnesses and that in urging that some of their statements

are inherently improbable or contrary to other proven facts and established circumstances is an attempt to impeach them.

This subject is discussed in our original brief on pages 255 to 257, 340 to 350. Further on the same subject, the trial court mentioned the fact that Wilson was a reluctant witness (R., 286) and that the entrymen forming the Steffey group were also reluctant witnesses (R., 351).

It was held in *Dravo* v. *Fabel*, 132 U. S., 487, 490, that "while the plaintiffs were not concluded by their (plaintiff's witnesses) evidence and might show that they were mistaken it could not be properly contended by the plaintiffs that they were unworthy of credit. The evidence must be *given such weight as under all the circumstances it is fairly entitled to receive.*"

In *United States* v. *Barber Lumber Co.*, 172 Fed., 948, the court held that while of course the Government was not concluded by the testimony of its own witnesses, it could not insist that they were unworthy of belief or that their testimony should be entirely disregarded and that unless self-contradictory and inherently improbable it must necessarily prevail in the absence of countervailing evidence.

The testimony of the entrymen Bashor and Joel H. Benton and a number of the entrymen forming the O'Keefe group is very significant. Bashor testified on behalf of the Government as follows:

> Q. Now, did you have any talk with Will Kettenbach about this claim?

A. About the land?

Q. Yes.

A. No, sir.

Q. Never on any occasion?

A. No, sir. All the conversation was done through Mr. Robnett; there was nothing between Kettenbach and I.

Q. Didn't you meet Mr. Will. Kettenbach on the train one day and have a talk with him?

A. Well, I was thinking—yes, it was Kettenbach, too; I was thinking at a time since, but it was Kettenbach. I met him on the train as I went to Moscow, it seems.

Q. What did he say then?

A. I told him I had just received a letter from Robnett with reference to the timber land, and he wanted me to give him a deed to that to properly satisfy the note and mortgage. I told him Robnett wanted me to turn it over to Kettenbach; the letter was from Robnett and I had just received it a few days before meeting Mr. Kettenbach on the train.

Q. What did Kettenbach say to you?

A. He told me to take it up with Robnett when I got back home. I told Mr. Kettenbach I wouldn't take it.

Q. What did Kettenbach say he was giving for those claims, over and above the notes?

A. About $30.00, that was about what it amounted to. I think he was offering me a $1,000.00, but that is about what it amounted to—$30.00 above notes and interest. That was 2 years and ½ though after final proof was made."

This shows the reluctance of the witness to testify freely, and a disposition to eliminate Kettenbach as much as possible from any connection with the transaction; and that Robnett was acting for Kettenbach in the timber transactions, and that whereas in fact he was getting but $30.00 out of the transaction, he desired to make it appear that the claim brought $1,000.00, and volunteered the statement that the transfer was 2½ years after proof was made. The evidence of this witness also shows, as does the evidence of the other entrymen who gave notes or mortgages for the money advanced, the method pursued by Kester, Kettenbach, and Robnett to compel the entrymen to comply with the unlawful agreements they had with them. Thus they would advance a little over $400 to the entrymen and take a note from them of $700 to $750 with interest at 12% per annum. The note and interest in a short time would amount to between $800 and $1,000. In many instances that amount was more than the claim would readily sell for. Demand would then be made for the payment of the note and foreclosure threatened. Sometimes Kester and Kettenbach would suggest that the entryman should endeavor to sell his claim to some one else. In one instance it was suggested that the entryman pay $5.00 a month on account. The entryman under the conditions stated being unable to make a quick sale of the claim and fearing the expenses of foreclosure and a deficiency judgment against him, or appreciating the fact that a payment of $5.00 a month would not even pay the interest on

the note, would naturally convey the claim to Kester and Kettenbach on whatever terms they imposed. For the purpose of impeaching Robnett appellees (Tannahill's orig. B., 97) quote from the cross-examination of Joel H. Benton as follows:

> Q. I will ask you, Mr. Benton, if during the talk with Robnett if he said anything to you about not letting Kettenbach or Kester know of his purchasing the land, or of his arrangements with you?
>
> A. He told me several times he had no connection with them whatever, that he had nothing to do with them at all; it was on his own account.
>
> Q. And what was his action in regard to them not knowing what he was doing in regard to the land? State whether or not he tried to keep it from them, or talked with them or where they could hear you.
>
> A. He did; he tried to keep it secret.
>
> Q. He tried to keep it from them?
>
> A. Yes, sir; he took me out in the directors' room and he did not want anybody to hear what he was doing.

The testimony of this witness, given at the pages referred to in the Government's brief, shows his hostility to the Government and his bias in favor of the appellees. The portion of his testimony here quoted is inherently improbable when you consider the fact that the Robnett entrymen conducted practically all of the arrangements in connection with their entries with Robnett at the bank, some of them being there 4 or 5 times for that purpose; that Robnett obtained

from Kettenbach the money for 11 of them to make proof, and purchase the land, and that Robnett negotiated the transfer of the entries to Kettenbach.

The lower court found that O'Keefe in procuring the entrymen forming his group to make entries and furnishing the money therefor was actuated not only by the hope that he would later acquire the title to their entries for Kester & Kettenbach, but by a feeling of friendliness toward the entrymen. The testimony of the entrymen was to the effect that O'Keefe was extremely friendly toward them and that his disposition and impulses were such that he would go a great length to befriend a person whom he liked and that he would have advanced to them the money to initiate and perfect their entries even though he had no expectation of obtaining the titles to the claims they entered. They also testified that when they conveyed their claims to O'Keefe that he assured them that they were executing merely a bond for a deed and that they could redeem the same at any time during the life of the notes they had given to him, when in fact they executed warranty deeds. Thus in one breath they would lead one to believe that O'Keefe was a good and unselfish man and in the next that he was a scamp and would impose upon his near relative and close friends. The testimony of the said witnesses in this respect is inconsistent, and the fact that all of them executed warranty deeds to O'Keefe either the day after or within 4 or 5 days after making their proofs, and that O'Keefe in turn conveyed the claims thus

acquired to Kester and Kettenbach within a week thereafter, which deeds the latter withheld from the record for a year and a half, together with the other facts and circumstances surrounding the making of the entries as set forth in the Government's original brief (see discussion "O'Keefe Group" Government brief 133 to 160 and 178 to 190), renders their testimony in this respect inherently improbable.

In our original brief (p. 255) we urged that the fact that many of the entrymen denied on cross-examination that they made agreements antecedently to making their applications does not go far in any instance to show that agreements in fraud of the statute did not exist; and that all of the entrymen were disposed to put the fairest face possible upon their conduct and the more so in cases where their conduct was felt to be compromising; and that most of the entrymen were manifestly well disposed towards, if not actively sympathetic with the defense. Having the proper regard for the purpose of cross-examination and the reasons that make leading questions ordinarily permissible thereon we still contend that the Government's cases should not depend solely upon what the witnesses called on its behalf testified to on cross-examination. So whether or not any one of the entrymen have entered into such an arrangement as is forbidden by the statute is not to be established entirely by what he says in response to a question framed in the words of the statute and admitting of a categorical answer, but is to be inferred from the arrangement as it is

proved and the testimony of the Government witnesses who are entrymen should be weighed like other testimony with reference to the inherent reasonableness of what they say and the harmony of the facts to which they testify with the other facts established in the case, and also with reference to the considerations of self interest and self protection pressing upon said witnesses. In view of the attitude and disposition of the entrymen who were called as witnesses for the Government, it was improper for counsel for the appellees upon cross-examination to lead them and to put words in their mouths as they did. On the other hand the record will disclose the fact that Government counsel was justified in asking leading questions of the Government's witnesses and in cross-examining them, in many instances.

Professor Wigmore, in his work on Evidence, discussing the rule on the cross-examination of one's own witnesses and of leading a friendly witness on cross-examination, says:

> The typical situation in which the witness's presumable bias removes all danger of improper suggestion is that of opponent's witness under cross-examination. The purpose of the cross-examination is to sift his testimony and weaken its force, in short, to discredit the direct testimony; thus, not only the presumable bias of the witness for the opponent's cause, but also his sense of reluctance to become the instrument of his own discrediting, deprive him of any inclination to accept the cross-examiner's suggestions unless the truth forces him to.

Accordingly, it is well settled that in cross-examination of an opponent's witness, *ordinarily* no question can be improper as leading. Appleton, C. J., in *State* v. *Benner*, 64 Me., 279: "Cross-examination of an opponent's witness (in leading form) is allowable. Why? Because being called by him (the opponent) it has been imagined that there was some tie of sympathy or interest which would induce partiality on the part of the witness in favor of the party who called him." (Sec. 773, Wigmore Evidence.)

Yet, when the reason ceases, the rule ceases also; thus, when an opponent's witness proves to be in fact biased in favor of the cross-examiner, the danger of leading questions arise and they may be forbidden. Appleton C. J., in *State* v. *Benner* (supra) said: "If the witness is from any cause adverse to the party calling him, the same reason which authorizes and sanctions cross-examination, more or less rigorous, equally requires it when the party finds that the witness whom the necessities of his case have compelled him to call is adverse in feeling, is reluctant to disclose what he knows, is evasive or false. Important as interrogation may be, if the witness is friendly, to remove uncertainty and indistinctness and to give fullness and clearness, doubly important is it, if the witness be dishonest and adverse, to extract from reluctant lips facts concealed from sympathy, secreted from interest, or withheld from dishonesty. Cross-examination may be as necessary to elicit the truth from one's own witness as from one's opponent's witness." (Sec. 774 Wigmore.)

STEFFEY GROUP OF ENTRIES.

The lower court held that the entries forming this group were made pursuant to agreements between Steffey and the entrymen, but that Kester and Kettenbach acquired title to the same as innocent purchasers. The discussion of these entries will be found at pages 203 to 238 of our original brief, and our argument as to whether Kester and Kettenbach were innocent purchasers is set out under the heading, "Innocent purchaser," at pages 291 to 304, Government's original brief. The discussion of these entries on behalf of the appellees (Tannahill's original brief, 53 to 94), read in connection with the portion of the Government's brief, will convince the court that said entries were made in fraud of the statute, and that Kester and Kettenbach acquired title to the same with knowledge of their infirmities. The lower court found that the conversation relied upon by the Government as constituting the agreement between Dwyer and Steffey that the claims should be entered for the use and benefit of the appellees did not take place until after Dwyer had looked at the claims of Mrs. Jolly and Mrs. Loney, and that Dwyer had not viewed these claims until after they were filed upon, and only one claim was entered after the filing of these claims. (R., 357, 358.)

The court is in error in this as shown by the table and the pages of the record cited at page 231 of the Government's brief. It is shown that four entries forming the said group were made after the filing of the application of Mrs. Loney and Mrs. Jolly,

namely, Charles E. Loney, James T. Jolly, Clinton E. Perkins, and Frank J. Bonney. As further corroboration of Steffey's testimony that the agreement between Dwyer and himself to procure the entrymen to enter the claims for the use and benefit of petitioners pursuant to prior agreements was made before any of the entrymen had initiated their entries, the record shows that each of the entrymen, except Charles S. Myers and Frank J. Bonney, gave the name of Dwyer as one of his witnesses in the notice of publication which he was required to give the day he made his original application. (Notice of publication of James T. Jolly, April 3, 1906 (R. 3966); J. T. Jolly, March 23, 1906 (R. 3971); Mary A. Loney, March 23, 1906 (R. 3975); Charles E. Loney, April 3, 1906 (R. 3978); Jannie Myers, March 19, 1906 (R. 3825); and Clinton E. Perkins, April 19, 1906 (R. 3845).) The witnesses thus published, at final proof would be inquired of as to whether the land was occupied or had any improvements on it, and whether the same was more valuable for mineral for any other purposes than for the timber or stone thereon, or whether it was chiefly valuable for its timber or stone. (R. 3973). Of course, said entrymen would not have named Dwyer as a witness in their notices of publication unless he had been suggested by Steffey, and it is manifest that Steffey would not have suggested Dwyer as a witness unless the knew that he had been over the lands and was acquainted with their character and was qualified to give the information at final proof. There is no

question that Dwyer knew all about the Charles Myers claim which was the first of the group entered, as he had contested that claim after it was entered as a homestead and the contest settled by relinquishment before Myers filed. Dwyer appeared as a witness on behalf of Clinton E. Perkins when he made final proof. (R., 3845.)

It is contended by appellees (Tannahill's orig. B., 87–89) that Kester testified that the consideration mentioned in the deeds made by the Steffey entrymen was actually paid by Kester and Kettenbach, because Kester testified to that effect. The lower court also relied upon this testimony as showing that Steffey's testimony was thereby contradicted and that Steffey had made a large profit out of each claim, as he had testified that he had furnished each of the entrymen less than $500 to perfect his entry and had given each of them about $200 over and above the amount advanced for their services, and that he had therefore appropriated to his own use the difference between those amounts and the amounts mentioned in in the deeds. A reading of the record (pp. 3173, 3174) will show that each deed was presented to Kester and that he was asked by his counsel to look at the deed and tell what amount he paid Steffey for the claim conveyed by the deed he held in his hand, and in each instance he mentioned the consideration set out in the deed. Such testimony coming from an interested witness and one so thoroughly discredited as Kester does not seem to go very far in proving anything.

O'KEEFE GROUP OF ENTRIES.

As to the entries forming this group the lower court held that if the same had been fraudulently entered Kester and Kettenbach would be chargeable with notice by reason of the relations that existed between them and O'Keefe. A discussion of these entries appears at pages 133 to 160, 178 to 187, 237, Government's brief.

It is to be borne in mind that Kester and Kettenbach withheld the deeds to these claims from the record for one and one-half years after they were made and as was said by this court in *Linn-Lane Timber Company* v. *United States,* 196 Fed., 597 "the fact that a deed is withheld from record or is otherwise concealed is a badge of fraud."

We feel confident that the court will hold that the entries forming this group were made in fraud of the statute, and that Kester and Kettenbach acquired title to the same with notice of the fraud and are not innocent purchasers.

HANSEN ENTRY.

The facts concerning this claim are set out at pages 57 to 60 of the Government's original brief and clearly show that the same was fraudulently entered. The bill of complaint charges that the Hansen entry was conveyed to appellee Kettenbach subject to a mortgage given to Curtis Thatcher, but that said deed to Kettenbach has not been recorded, and that the entry was unlawfully made, and in furtherance of

the conspiracy therein charged. (R., 4278, 4279.) In his answer petitioner Kettenbach admits—

> that the said Soren Hansen made entry of a certain described tract of public land, as alleged in complainants' bill in equity, and deny that he, the said Soren Hansen, did thereafter convey the same to the defendant, William F. Kettenbach, subject to a mortgage previously by the said Soren Hansen made to the defendant Curtis Thatcher, which mortgage appears on the land records of Nez Perces County wherein the said land is situated, and that the same has not been released. (R., 4447, 4448.) * * * *but denies* that the land or the *title thereto has been conveyed as* aforesaid by the said *Soren Hansen* to *the said William F. Kettenbach* and deny that the said land *was ever by the said Soren Hansen conveyed* to the defendant William F. Kettenbach, deny *that the defendant William F. Kettenbach has any interest therein, and deny that* the said land was entered by the said Soren Hansen in the, or any, unlawful, corrupt, or fraudulent manner, as alleged in complainant's bill in equity, or in respect of all of the lands set out in said bill or in furtherance of the conspiracy charged in complainant's bill in equity, or the title to the said land thus entered by the said Soren Hansen is invalid, obtained in fraud of the law, or voidable at the suit of the United States, but admit that the said various transferees had notice and knowledge of the issuance of the patents to said lands. (R., 4449.)

This answer is signed by petitioners William F. Kettenbach, Kester, and Dwyer and was filed April

15, 1910. (R., 4480.) The deed to Kettenbach is dated March 5, 1909, and acknowledged May 15, 1909, but has not been recorded. (R., 516, 523.) Before executing this deed, however, Hansen executed a deed to the Clearwater Timber Company for the claim. (R., 524.)

The record title to this claim is in the Clearwater Timber Company. Kettenbach endeavored to sell the claim to the Clearwater Timber Company and had a deed executed by Hansen to the company. The deed was recorded while the notice of *lis pendens* was of record and the company admits that it did not pay any consideration for the deed; that it has not paid taxes on the claim and does not own nor has it ever owned or claimed title to said entry or any interest therein; and the record further shows that the company has quitclaimed the entry to Kettenbach but that the deed therefor is withheld from the record. This phase of the entry is discussed at pages 323, 324, 325, Government's original brief.

At the date of execution of the deed from Hansen to Kettenbach the original bill in these cases was pending and the Hansen entry was attacked therein, and notice of *lis pendens* was of record, and Kettenbach was a party to said suit and had been served with process. (R., 18.) It is manifest from reading the testimony in connection with this entry that Kettenbach deliberated misstated the facts in regard to this entry in his answer filed in these cases and had it not been for certain facts developed in the testimony of Hansen and Nathaniel Brown, the agent of

the Clearwater Timber Company, it is doubtful whether the deed from the Clearwater Timber Company to Kettenbach then in the possession of one of counsel of record in these cases and had been held by him for some time, would have been produced or ever heard of, and that Kettenbach would have endeavored to maintain at the trial that he did not then nor at any other time have any interest in said claim, as stated in his answer. Kettenbach testified that the agent of the Clearwater Timber Company presented him with a deed in which said company was grantee to have Hansen execute and that the same was executed by Hansen, and that subsequently he prepared a deed for the claim in which Hansen was grantor and Kettenbach was the grantee for Hansen to execute (R., 1393); and at the time of the execution of the deed by Hansen to the Clearwater Timber Company, Kettenbach had bought and paid for the claim and that he has paid taxes on the same ever since and that the claim is his. (R., 1694.)

Both Kettenbach and the Clearwater Timber Company are parties to the case in which the Hansen claim is involved. The evidence shows that the former has no interest in the claim and that Kettenbach has title to the same.

Appellees urge that there is no evidence as stated in the Government's original brief (p. 56) to sell the Hansen claim to the Clearwater Timber Company (Babb's B., 42). Robnett testified to the arrangement. (R., 2318.)

IDAHO TRUST COMPANY.

Under this heading in our original brief, pages 305 to 316, we have shown Frank W. Kettenbach's relations to petitioners Kester, Kettenbach, and Dwyer and his connection with the Idaho Trust Company; and that he negotiated the transfer of the title to the claims from Kester, Kettenbach, and Dwyer to said company and have made it clear that he had knowledge of the conditions under which said entries were made and perfected, or, at least sufficient notice to put him upon inquiry, and that therefore the Idaho Trust Company, which he represented, can not be held to be an innocent purchaser.

Complaint is made—

> that the Government has offered in evidence an anonymous campaign circular circulated in a political campaign in 1904 (vol. 11, pp. 4020 to 4026) in which this litigation had its origin, also newspaper publications in support of the same propaganda (vol. 11, p. 4627) and an affidavit of Frank W. Kettenbach (vol. 11, pp. 4042 to 4060) (Babb's B. 21).

The objectionable campaign circular and newspaper publications were attached to an affidavit of Frank W. Kettenbach and filed in the United States District Court of Idaho by him in support of a motion for a change of place of trial of a case in which he was indicted for violating the national-bank act, his contention being that by reason of the wide circulation of these publications in the northern division of the District of Idaho where he lived and wherein

the timberlands in suit are situated such widespread prejudice had been created against him because of the charges that he had been connected with Kester and Kettenbach in their fraudulent land schemes as far back as 1904, that it would be impossible to secure a jury in that community that would give him a fair trial. The said criminal cases against him were consequently transferred to the central division of the district for trial. These papers were introduced in the present cases for the purpose of showing that according to Frank W. Kettenbach's own sworn statements practically everybody in the northern part of the State were given notice of Kester and Kettembach's fraudulent land transactions and that therefore he could not claim that he was not put upon inquiry. (R., 4052, 4053, 4059, 4020 to 4030.)

CLEARWATER TIMBER COMPANY.

In addition to what we have said in our original brief under this head, pages 317 to 326, to the effect that the Clearwater Timber Company took and now holds the title to a number of entries involved in the present cases knowing the entries to be invalid and voidable by the United States, the record shows that N. B. Brown, who negotiated for the entries attacked, was the purchasing agent in Idaho for the Clearwater Timber Company and had been so for 8 years and purchased timber lands for said company. (R., 1639.)

There were no officers of the Clearwater Timber Co. residing in Idaho, and Brown was the only agent it had in the State. F. J. Davies, of Spokane, Wash-

ington, testified that he never made any purchases in Idaho of timberland for said company but that he honored Brown's drafts for the purchases made by him of timberlands and closed the purchases; and that the purchase of timberlands in Idaho was left exclusively to Brown's judgment, and that Brown was the only person in Idaho that was purchasing timber for the Clearwater Timber Company at the time of the purchase of the claims mentioned. (R. 3615 to 3623.) The argument of counsel for appellee, the Clearwater Timber Company, is inconsistent in that in regard to the Benton, Washburn, and other entries he contends that Brown was not aware of the chain of title nor did he look at or examine the abstract of said claims, while in regard to the purchase of the Hansen claim he was much concerned as to the validity of the title. (Babb's B., 36, 42.) It is to be borne in mind that all of these claims were purchased by Brown for the Clearwater Timber Company shortly after the conviction of Dwyer and Robnett on the charge of subornation of perjury in connection with their land transactions; and Kester, Kettenbach and Dwyer had been convicted of conspiracy to defraud the Government of a number of timber claims, at which trial Brown had appeared as a witness.

OPPORTUNITY OF TRIAL COURT TO SEE AND HEAR THE WITNESSES.

It is contended that unusual weight should be given to the finding of facts by the lower court, as the judge

who tried the present cases had the opportunity of hearing the witnesses testify and of observing their demeanor on the stand and of knowing the facts and the circumstances surrounding the witnesses in the giving of their testimony. (Tannahill's orig. B. 230, and Babb's B. 16.)

The testimony in these cases was taken before an examiner and not before the district judge in open court. As stated in our original brief some of the witnesses in the present cases testified in a criminal case against three of the appellees wherein it was charged that a number of the entries involved in the present cases were unlawfully entered in furtherance of a criminal conspiracy. The trial court alludes to that matter in its opinion. It would seem, however, that no greater weight should be given to the observations of the court in these particular cases than in the case where a judge in any other equity proceeding states in his opinion that he had been aided in reaching his conclusion by his acquaintance with some of the witnesses or that he had seen and heard them testify at a criminal trial. As a matter of fact, a comparatively small number of the witnesses appeared before the lower court in any of the trials referred to and the court held that the claims of a number of those witnesses were entered in fraud of the statute, and as to a number of others, such as Carey, Ed. M. and H. F. Lewis, Lambdin, and Shaffer, who testified at former trials, no mention is made either of them or of their entries. The following are some of the witnesses and

entrymen in the present cases who have not appeared before the lower court in any of the cases:

Steffey and the eight entrymen forming his group, Maris, Washburn, Robertson, Nelson, Hansen, Little, Harrington, Pierce, Bashor, John H. Long, George Morrison, Hyde, Clute, Evans, Bishop, Newman, Dent, Smith, Dammarell, Bingham, E. P. Kester, Elizabeth Kettenbach, Elizabeth White, William J. White, Mamie P. White, Hallett, Greenburg, McMillian, Rowland, and Gammon.

Appellees cite *Vanderbilt* v. *Bishop*, 199 Fed., 420, recently decided by this court in support of their contention that under the circumstances the finding of the lower court on the facts should not be interfered with by this court. The case cited is not in point as in that case the judge of the lower court presided at the trial, saw all of the witnesses, and heard all of them testify to all of the facts in issue.

RES ADJUDICATA.

It is contended by appellees that, in view of the fact that they were acquitted in a criminal case wherein they were charged with acquiring some of the timberlands in suit in furtherance of a conspiracy to defraud the United States, the verdict of the jury was in effect a finding that the entries were valid and that the finding in the criminal case should be controlling in this court as to the entries that were alleged in the criminal case to have been unlawfully made. This question was raised by appellees by the pleadings of the lower court. The court held that

that defense was insufficient in law, following the decision of the Supreme Court in *Stone* v. *United States* (167 U. S., 178, 184).

MISLEADING STATEMENTS.

(*a*) Appellees quote from the testimony of the witness Cornell as follows (Tannahill's orig. B., 136):

> Q. If there was anything you could say that would help them (Kester and Kettenbach) to lose their land you would be willing to say it, wouldn't you?
>
> A. I certainly would; yes. * * *

They failed to quote, however, the testimony of the witness which followed immediately:

> Q. Mr. Cornell, would you say anything untrue that would cause them to lose their land?
>
> A. No; nothing but the facts. (R., 2860.)

(*b*) In Tannahill's original brief, page 141, appears the following:

> We are unable to set forth here the entire evidence of Harvey J. Steffey, but inasmuch as the trial court *observed the evidence of Harvey J. Steffey when he testified against the defendants in the criminal case* and upon various other occasions, etc. * * *

Steffey did not testify at any of the trials of petitioners in any criminal case at which Judge Dietrich presided. He did testify on behalf of the Government in the Bank case but Judge Bean presided at that trial.

O'KEEFE GROUP OF ENTRIES.

As to the entries forming this group the lower court held that if the same had been fraudulently entered Kester and Kettenbach would be chargeable with notice by reason of the relations that existed between them and O'Keefe. A discussion of these entries appears at pages 133 to 160, 178 to 187, 237, Government's brief.

It is to be borne in mind that Kester and Kettenbach withheld the deeds to these claims from the record for one and one-half years after they were made and as was said by this court in *Linn-Lane Timber Company* v. *United States*, 196 Fed., 597 "the fact that a deed is withheld from record or is otherwise concealed is a badge of fraud."

We feel confident that the court will hold that the entries forming this group were made in fraud of the statute, and that Kester and Kettenbach acquired title to the same with notice of the fraud and are not innocent purchasers.

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The facts concerning this claim are set out at pages 57 to 60 of the Government's original brief and clearly show that the same was fraudulently entered. The bill of complaint charges that the Hansen entry was conveyed to appellee Kettenbach subject to a mortgage given to Curtis Thatcher, but that said deed to Kettenbach has not been recorded, and that the entry was unlawfully made, and in furtherance of

the conspiracy therein charged. (R., 4278, 4279.) In his answer petitioner Kettenbach admits—

> that the said Soren Hansen made entry of a certain described tract of public land, as alleged in complainants' bill in equity, and deny that he, the said Soren Hansen, did thereafter convey the same to the defendant, William F. Kettenbach, subject to a mortgage previously by the said Soren Hansen made to the defendant Curtis Thatcher, which mortgage appears on the land records of Nez Perces County wherein the said land is situated, and that the same has not been released. (R., 4447, 4448.) * * * *but denies* that the land or the *title thereto has been conveyed as* aforesaid by the said *Soren Hansen* to *the said William F. Kettenbach* and deny that the said land *was ever by the said Soren Hansen conveyed* to the defendant William F. Kettenbach, deny *that the defendant William F. Kettenbach has any interest therein, and deny that* the said land was entered by the said Soren Hansen in the, or any, unlawful, corrupt, or fraudulent manner, as alleged in complainant's bill in equity, or in respect of all of the lands set out in said bill or in furtherance of the conspiracy charged in complainant's bill in equity, or the title to the said land thus entered by the said Soren Hansen is invalid, obtained in fraud of the law, or voidable at the suit of the United States, but admit that the said various transferees had notice and knowledge of the issuance of the patents to said lands. (R., 4449.)

This answer is signed by petitioners William F. Kettenbach, Kester, and Dwyer and was filed April

(*c*) It is contended by appellees that the testimony of John P. Roos, a Government witness, was outlined by a former assistant United States attorney, and that he testified as prompted by that official, and quotations from the testimony are set out in an effort to support it. (Tannahill's orig. B., 174 to 177.)

The record shows the true facts to be that Mr. Roos, when called upon to tell of his transactions with Kester, was not inclined to give any information on the subject and endeavored to shield Kester. The Government officer being advised of some of the details of the transaction related them to Roos, who then decided to tell all he knew about the matter.

(*d*) Appellees claim that it is indirectly charged in the Government's brief that the entrymen were indigent, and it is then urged that this statement is without foundation. (Tannahill's B., 3 to 20.)

We are unable to find in our original brief any general reference to the financial condition of the entrymen. We mentioned the fact that Cornell was indigent (Gov. orig. B., 121) and that 4 or 5 of the O'Keefe entrymen were impecunious persons (Gov. orig. B., 156), and the record sustains both of these assertions. We did not go into the financial condition of the entrymen further than to show how, by whom, and at what salary a number of them were employed, and that with few exceptions none of them had sufficient money to initiate his entry or to purchase the land. In support of the question

raised by themselves as to whether or not the entrymen were indigent, it is stated that Fred W. Newman was running a warehouse for Frank W. Kettenbach and received a salary of $75.00 per month, and owned a house (Tannahill's Sup. B., 10); that Perkins owned a farm and sold timber and cattle and thereby obtained the money with which to make proof and at that time he had more than $400 in cash (Tannahill's Sup. B., 12); and that the money with which Entryman Nelson made proof was handed to him by Miller (Tannahill's Sup. B., 14). The record shows that at the time of proof Newman was the janitor of the Idaho Trust Company, and that he received the money to make his proof from one Colby, who handed him a bunch of money in the hallway of the land office and told him to pay what it would cost and if anything was left to give it to Fred Emory (R., 687 to 689); that Steffey gave Perkins $400 with which to make proof, and Perkins testified that at the land office he had Steffey's $400 in one pocket and his own money in another pocket and that he made the proof with his own money and that he did not return Steffey's (R., 825 to 829); and that Nelson went to the Lewiston National Bank with Miller to get the money from Robnett with which to purchase the land, and Nelson testified that he was satisfied that Miller had his hand on the money (R., 1041 to 1048; Gov. orig. B., 55).

(*e*) The Clute entry was the only one of the Robnett group incorporated in the bill of complaint in case No. 2210 by amendment (R., 4499), and not the entire group of entries as is stated at page 239 of the Government's original brief.

Respectfully submitted.

PEYTON GORDON,
Special Assistant to the Attorney General,
Solicitor for Appellant.

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